En Banc Panel
7/20/06

C.A. No. 05-50415

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANGELICA LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of California
Honorable Barry Ted Moskowitz, District Judge

SUPPLEMENTAL BRIEF FOR APPELLEE UNITED STATES

CAROL C. LAM
United States Attorney

ROGER W. HAINES, JR.
Assistant U.S. Attorney
Chief, Appellate Section
Criminal Division

JASON A. FORGE
Assistant U.S. Attorney

CHRISTOPHER P. TENORIO
Assistant U.S. Attorney

880 Front Street, Room 6293
San Diego, CA 92101-8893
Telephone: (619) 557-7843/7463

Attorneys for Plaintiff-Appellee
United States of America

TOPICAL INDEX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANGELICA LOPEZ, Defendant-Appellant.	C.A. No. 05-50415 D.C. No. CR-04-1648-BTM

I

INTRODUCTION

This Court requested the Government to express its view whether the present case should be taken en banc to resolve an alleged conflict between United States v. Gonzalez-Torres, 309 F.3d 594 (9th Cir. 2002), and United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001), regarding the issue of when an alien smuggling offense under 8 U.S.C. § 1324(a)(2) is considered complete.

Gonzalez-Torres does not conflict with Ramirez-Martinez, nor did it transform the crime of bringing an illegal alien to the United States into one that consists of a single, non-continuing act. Congress has expressly held that alien smuggling is a continuing offense in the federal statute governing the venue of continuing offenses. See 18 U.S.C. § 3237(a). Gonzalez-Torres did not (nor could it) overrule this legislative enactment. Also, public policy dictates that this Court should recognize the continued vitality of prosecutions of aiding and abetting the bringing of aliens to the United States. For these reasons, en banc review should not be granted.

II

ARGUMENT

A. EN BANC REVIEW IS NOT WARRANTED

1. Introduction

In United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001), this Court joined other circuits in concluding that the crime of bringing an illegal alien to the United States (8 U.S.C. § 1324(a)(2)) continues until the alien reaches his intended destination within the United States. Id. at 912-13 (citing United States v. Aslam, 936 F.2d 751, 755 (2d Cir. 1991); and Smith v. United States, 24 F.2d 907 (5th Cir. 1928)). Ramirez-Martinez marked the second time in less than a month that this Court reached such a conclusion, see United States v. Angwin, 271 F.3d 786, 804-05 (9th Cir. 2001), and neither this Court nor any other has retreated since, including this Court's decision in United States v. Gonzalez-Torres, 309 F.3d 594 (9th Cir. 2002). Gonzales-Torres merely held that Congress had eliminated the official-restraint doctrine from § 1324(a)(2) with its 1986 revisions to the statute. Id. at 599-600. While Gonzalez-Torres clarified when such violations have been *committed*, it did not change when such violations have *ended*. In other words, Gonzalez-Torres did not transform the crime of bringing an illegal alien to the United States from an offense that spans space and time into one that consists of a single, non-continuing act. Indeed, it could not.

2. Congress Has Expressly Determined Crimes Involving the Importation of People Into the United States to Be Continuing Offenses

Decades ago, the Supreme Court recognized that, "[B]y using the doctrine of a continuing offense, Congress may, to be sure, provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates." United States v. Johnson, 323 U.S. 273, 275 (1944). Congress accepted this invitation by adding the following paragraph to 18 U.S.C. § 3237(a):

> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237(a) (emphasis added); see id., Revision Notes:

> The last paragraph of the revised section was added to meet the situation created by the decision of the Supreme Court of the United States in United States v. Johnson, 1944, 65 S.Ct. 249, 89 L.Ed. 236, which turned on the absence of a special venue provision in the Dentures Act, section 1821 of this revision. The revised section removes all doubt as to the venue of continuing offenses and makes unnecessary special venue provisions . . . .

Id. (Emphasis added).

3. This Court Has Applied § 3237(a) in Contexts Very Similar to the Present Case

In United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), this Court applied Congress's revision to § 3237(a) in a case involving defendants who were convicted of multiple narcotics offenses. These offenses included importation of marijuana during two successful plane trips in which the defendants brought marijuana from

Mexico to Palmdale, California (Central District). One of the questions on appeal was whether the defendants could be charged with importation of marijuana in the Southern District of California. Relying on § 3237(a), this Court concluded that venue for the importation charges was proper in either district:

> As it relates to the second paragraph of 18 U.S.C. § 3237(a), the crime of importation of marijuana obviously involves both "transportation" and "foreign commerce." Thus by statute Congress has defined this crime as a "continuing" one. Congress has also explicitly provided that prosecution may be had in "any district from, through . . . which such commerce . . . moves." We have no doubt that, if the defendants had imported marijuana from Mexico on foot or on bicycle or car, and had taken it across the Southern District and into the Central District, venue would lie in either district. The only difference here is that they did it by flying across the Southern District.

Id. at 911 (emphasis added). This Court went on to find that venue for the possession with intent to deliver charges also could be laid in either district. Id. at 912.

The Barnard opinion reflects the lessons of Johnson and the meaning of the resulting revision to § 3237(a): Congress has the power to define offenses as continuous or unitary; once Congress defines an offense as continuous, it extends as far and long as the force propelled by an offender operates; offenses involving transportation in foreign commerce or the importation of an object or person into the United States are continuous; and, therefore, such offenses continue to be committed until the objects and people being transported or imported come to rest at their intended destinations.[1]

---

[1] Of course, a defendant may be charged with aiding and abetting an offense wherever and whenever the offense continues to be committed. See, e.g., (continued...)

The applicability of § 3237(a) to alien smuggling, as in this case, is even clearer than its applicability to narcotics smuggling, as in Barnard. Although § 3237(a) describes activities that would certainly encompass narcotics smuggling, the statute does not expressly mention narcotics. In contrast, it does explicitly provide that, "[a]ny offense involving the . . . importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such . . . person moves." 18 U.S.C. § 3237(a).

4. Transforming § 1324(a)(2) Violations Into Unitary Offenses Would Be Poor Public Policy

Such a conclusion is dictated not only by statute and precedent, but also by public policy. If Congress does not indicate where it considers a particular type of offense to have been committed, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946). Imagine a scenario where several aliens agree to pay to be smuggled from Mexico to Las Vegas, Nevada, via a route that is approximately the same length regardless of whether the aliens cross the border into

---

1/(...continued)
Angwin, 271 F.3d at 804-05 ("The aliens [appellant] transported were traveling to Los Angeles, [appellant] met them at a prearranged location shortly after some of them arrived at the United States, and he immediately helped transport them north. Under those circumstances a rational jury could easily conclude beyond a reasonable doubt that [appellant] aided and abetted a smuggling operation to bring aliens to the United States."); United States v. Jackson, 482 F.2d 1167, 1178-79 (10th Cir. 1973) ("It necessarily follows that as the substantive crime was committed in Colorado [a conclusion dictated by § 3237(a)], the crime for aiding and abetting may also be tried in that district.") (footnote omitted).

California or Arizona en route to Nevada. The aliens arrive in Las Vegas, where they and their driver are apprehended. The aliens, who were concealed for much of their journey, are willing to testify that they were driven straight from Mexico to Las Vegas, but they have no idea where they actually crossed the border, and the Government has no evidence to tip the scales one way or the other. If the offense of bringing aliens to the United States were unitary, ending the moment aliens first cross the border, the driver could not be prosecuted for violating § 1324(a)(2) because the Government would be unable to establish venue.

The foregoing consequence is only slightly less untenable if the aliens could confirm that they first crossed the border into California. With this twist, in order to prosecute the defendant's violation of § 1324(a)(2), the Government would have to remove the defendant from the District of Nevada, where he was arrested, where he intended to deliver the aliens, where his crime was intended to have its most lasting impact, and where all of the evidence and witnesses to the offense are located, to the Southern District of California, through which he happened to drive on the way to Nevada. See United States v. Cores, 356 U.S. 405, 407 (1958) ("The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."); Palliser v. United States, 136 U.S. 257, 266 (1890) ("[w]here a crime is committed partly in one district and partly in another it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate"). Clearly, the *locus*

delicti of a §1324(a)(2) offense must include the location where the crime is detected and stopped.

5. There Is No Indication That the Gonzalez-Torres Panel Intended Its Decision to Be Interpreted as Overruling Ramirez-Martinez

With the foregoing analysis in mind, we return to the question of whether Gonzalez-Torres overruled the holdings in Angwin and Ramirez-Martinez,[2] and transformed violations of § 1324(a)(2) from offenses that continue until the aliens reach their immediate destinations within the United States into offenses that are unitary, ending the moment the aliens are first brought to the United States. Gonzalez-Torres does not mention Angwin, and its only reference to Ramirez-Martinez is when it explains that, "[Appellant] does not challenge the indictment as duplicitous, so we have no occasion to reach the issue decided in United States v. Ramirez-Martinez, 273 F.3d 903 (9th Cir. 2001)." 309 F.3d at 600 n.2. This would be a rather strange approach were it the Gonzalez-Torres panel's intention to overrule Angwin, and to not only reach an issue decided in Ramirez-Martinez, but to overrule it on a different basis altogether--all in defiance of the well-established rule that "one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel." United States v. Gay, 967 F.2d 322, 327 (9th Cir. 1992).

Likewise, Gonzalez-Torres does not mention 18 U.S.C. § 3237(a), let alone contend that Congress overstepped its authority in revising the statute. This, too,

---

[2] Because both Angwin and Ramirez-Martinez held that a violation of §1324(a)(2) continues until the alien reaches his destination within the United States, any decision overruling the latter would necessarily overrule the former.

would be an odd way for the panel to go about nullifying a statute that the Supreme Court has not only invited, but applied (and thereby approved) applied. See, e.g., United States v. Rodriguez-Moreno, 526 U.S. 275 (1999) (applying § 3237(a) to kidnaping offense). Lastly, Gonzalez-Torres makes no mention of an issue being raised on appeal as to the continuous or unitary nature of § 1324(a)(2) violations. If it were the panel's purpose to overrule binding precedent of this Circuit and to nullify an act of Congress that has been applied by the Supreme Court, one would not expect it to do so by way of dictum distilled from its opinion nearly four years after it was filed.

There is no mystery here. Angwin and Ramirez-Martinez were rightly decided, as was Gonzalez-Torres. The latter opinion simply decided a different issue. With no conflict between these opinions, there is no conflict for this Court to resolve en banc. Cf. Barapind v. Enomoto, (en banc) (per curiam) 400 F.3d 744 n.8 (9th Cir. 2005) ("a three-judge panel faced with contradictory controlling precedents 'must call for en banc review'") (citing Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1478-79 (9th Cir. 1987)). In fact, because the holdings in Angwin and Ramirez-Martinez are in harmony with decisions from other circuits, decisions of the Supreme Court, an unambiguous statute, and public policy, it is difficult to imagine any circumstances under which re-examining Angwin and Ramirez-Martinez would be an effective use of this Court's resources.

III

CONCLUSION

For the above reasons, the present case should not be taken en banc.

Dated: 7/17/06

Respectfully submitted,

CAROL C. LAM
United States Attorney

ROGER W. HAINES, JR.
Assistant U.S. Attorney
Chief, Appellate Section
Criminal Division

JASON A. FORGE
Assistant U.S. Attorney

CHRISTOPHER P. TENORIO
Assistant U.S. Attorney

Attorneys for Plaintiff-Appellee
United States of America

C.A. No. 05-50415

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to Fed. R. App. 40(b) and 32(a)(7) and Circuit Rule 40-1, the attached response to a petition for rehearing en banc is:

☒ Proportionately spaced, has a typeface of 14 points or more and contains no more than 9 pages, pursuant to the Order of this Court (dated June 27, 2006), or is:

☐ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or ___ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

July 17, 2006
Date

CHRISTOPHER P. TENORIO
Assistant U.S. Attorney

C.A. No. 05-50415

STATEMENT OF RELATED CASES

Counsel for the Government is unaware of any related cases.

C.A. No. 05-50415

CERTIFICATE OF SERVICE

I am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is Office of the U.S. Attorney, 880 Front Street, Room 6293, San Diego, California 92101-8893.

On this date, I served the within Supplemental Brief for Appellee United States in Court of Appeals No. 05-50415, by placing true copies thereof in a sealed envelope with postage thereon fully prepaid, at San Diego, California, addressed as follows:

Clerk of the Court (by Federal Express)
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Steven F. Hubachek (by Federal Express)
Federal Defenders of San Diego, Inc.
225 Broadway Avenue, Suite 900
San Diego, CA 92101

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2006, at San Diego, California.

Marcia L Richardson

05-50415

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

ANGELICA LOPEZ,

Defendant-Appellant

Appeal from the United States District Court
for the Southern District of California
Honorable Barry Ted Moskowitz, District Judge

APPELLANT'S SUPPLEMENTAL BRIEF

STEVEN F. HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Attorneys for Defendant-Appellant

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

MISCELLANEOUS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ANGELICA LOPEZ, Defendant-Appellant.	U.S.C.A. No. 05-50415 U.S.D.C. No. 04cr1648-BTM

I.

INTRODUCTION

On June 27, 2006, the Court ordered the parties to submit simultaneous briefs on whether the instant case should be heard en banc to resolve a conflict between United States v. Gonzalez-Torres, 309 F.3d 594, 599 (9th Cir. 2002) (holding that the crime of "bring[ing] aliens to the United States," as defined by 8 U.S.C. § 1324(a)(2) is complete once the alien crosses the border), and United States v. Ramirez-Martinez, 273 F.3d 903, 912 (9th Cir. 2001) ("the offense of bringing in aliens is not complete until the alien reaches his immediate destination in the United States."). Unless Ramirez-Martinez's "immediate destination" discussion is dicta, the cases conflict, requiring en banc resolution.

Ms. Lopez has raised several claims relating to the "immediate destination" element. She has argued that the evidence on the "brings to" counts is insufficient either way. If arrival at an "immediate destination" is not an element, see Gonzalez-Torres, 309 F.3d at 599, and the government is obliged to prove that she acted

before the aliens entered the United States, see, e.g., United States v. Angwin, 271 F.3d 786, 804-05 (9th Cir. 2001) ("Angwin II"), then the evidence is insufficient because the aliens were in the United States for days before Ms. Lopez acted. Even if the evidence is not insufficient on that basis, the jury instructions on "immediate destination" were certainly erroneous if Gonzalez-Torres is correct. [ER 169-70]. Given that the jury likely convicted on that theory, having posed a question to the district court on that instruction during deliberations, [ER 171-80], the error requires reversal. Indeed, this Court has made clear that reversal is required in light of erroneous instructions when it is not clear what theory the jury relied upon. See United States v. Heredia, 429 F.3d 820, 825 (9th Cir. 2005). See also Middleton v. McNeil, 541 U.S. 433, 437 (2004) ("If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.").

If reaching an "immediate destination" is an element, then it was never satisfied. Therefore, the offense was not completed and Ms. Lopez could be guilty of, at most, an attempt. See Ramirez-Martinez, 273 F.3d at 903 ("the offense of bringing in aliens is not complete until the alien reaches his immediate destination in the United States."). See also United States v. Johnson, 376 F.3d 689, 694 (7th Cir. 2004) (in a case where "it was factually impossible for Johnson to complete the offense, he can only be

subject to prosecution for an attempt"). She was not charged with an attempt. Without resolving the tension between Gonzalez-Torres and Ramirez-Martinez, these issues cannot be resolved.

II.

GONZALEZ-TORRES HELD THAT A "BRINGS TO" OFFENSE WAS COMPLETE WITHOUT ANY CONSIDERATION OF THE ALIENS' IMMEDIATE DESTINATION.

In Gonzalez-Torres, the defendant was charged with being a deported alien found in the United States, in violation of 8 U.S.C. § 1326, unlawful entry, in violation of 8 U.S.C. § 1325, and bringing aliens to the United States, in violation of 8 U.S.C. § 1324(a)(2)(B)(iii). Gonzalez-Torres had been observed, along with a group, crossing the border line into the United States by a Border Patrol agent. Gonzalez-Torres, 309 F.3d at 597. They were continuously observed by agents until their apprehension. See id. Prior to apprehension, Gonzalez-Torres was observed communicating with the group by way of hand signals. See id.

This Court reversed the deported alien and unlawful entry convictions, finding that Gonzalez-Torres was under official restraint owing to the constant surveillance of Border Patrol agents. See id. at 598-99. As a result, he had not "entered" the United States, as that term is employed under immigration law. See id. An "entry" was an element of both the section 1325 and 1326 charges. See id.

Even so, Gonzalez-Torres affirmed the "brings to" convictions, reasoning that amendments to section 1324 had deleted the

requirement that the smuggled alien effect an "entry" into the United States. See id. at 599-600. Specifically, Congress' substituted the phrase "bring to" for "bring into". See id. at 599. The "bring into" language gave rise to the former "entry" requirement. See id.

This Court found that the current "bring to" statute -- the statute applicable here -- was unambiguous, and did not require an "entry." See id. Since there was sufficient evidence to show that Gonzalez-Torres was guiding the group, Gonzalez-Torres affirmed. See id. at 600.

Gonzalez-Torres contains no discussion of an "immediate destination" requirement. Rather, it cites legislative history suggesting that Congress amended section 1324 to ensure that liability attached *earlier* in a smuggling event, even before "entry." See id. at 599.[1] Although there is no discussion of the

---

[1] Following the Mariel, Cuba boatlift in the early 1980s, courts in the Southern District of Florida, and the Eleventh Circuit, held that many of the people who brought the Mariel Cubans to the United States could not be prosecuted under the then-existing section 1324 because they presented the aliens to immigration officials to seek asylum: "the critical fact preventing prosecution of the defendants [who brought the Mariel Cubans to the United States] . . . was that the defendants had brought the aliens to INS officials." United States v. Nguyen, 73 F.3d 887, 892 (9th Cir. 1995).

Partly in response to these cases, Congress amended section 1324 through the Immigration Reform and Control Act of 1986. Those amendments included the "bringing to" offense now found in §1324(a)(2). The House Committee on the Judiciary stated:

> The gap in current law [created by the Southern District of Florida and Eleventh Circuit holdings] must be closed. Without the threat of criminal prosecution, there is no

topic, the Gonzalez-Torres court could not have believed that there was an "immediate destination" element. Because Gonzalez-Torres was arrested while walking a trail near the international border line, he could not possibly have arrived at an "immediate destination," no matter how one defines that term.[2] Therefore, Gonzalez-Torres cannot be reconciled with Ramirez-Martinez's view that the offense was not complete until an "immediate destination" is reached. By affirming the convictions, Gonzalez-Torres necessarily held that the offenses were complete without proof of reaching an "immediate destination." See, e.g., United States v.

> effective way to deter potential transporters from inundating U.S. ports of entry with undocumented aliens. As happened during the Mariel episode, the United States would be forced to expend extraordinary amounts of money and human resources in processing, monitoring, caring for and giving hearings to exorbitant numbers of people.

Id. at 892-93 (quoting H.R. Rep. No. 682(I), 99th Cong., 2d Sess. 66 (1986), reprinted in 1986 U.S.C.C.A.N. 5649, 5670). Essentially, Congress made it a crime to bring undocumented aliens to the border, perhaps even before they cross it. For Ms. Lopez's purposes, it suffices to say that the offense is complete no later than the moment the alien crosses the line, even if that crossing did not effect an "entry" as defined in immigration law. See Gonzalez-Torres, 309 F.3d at 599.

[2] The district court here made up its own definition:

> An alien who, after crossing the borderline, stops only briefly at a location not remote in time or location from the border, for the sole purpose of resting or awaiting imminent further transportation, has not yet arrived at his immediate destination in the United States.

[ER 169-70].

Yashar, 166 F.3d 873, 875 (7th Cir. 1999) ("[a]n offense is committed when it is completed") (citing Toussie v. United States, 397 U.S. 112, 115 (1970)). See also United States v. Blitz, 151 F.3d 1002, 1011 (9th Cir. 1998) (defendant's offenses were not "mere attempts" because "each was complete").

III.

RAMIREZ-MARTINEZ ADDS AN "IMMEDIATE DESTINATION" ELEMENT THAT WAS NOT REQUIRED IN *GONZALEZ-TORRES*.

In Ramirez-Martinez, this Court addressed a challenge to a "brings to" conviction entered under an aiding and abetting theory. Ramirez-Martinez argued that he could not be liable for aiding and abetting a "brings to" offense because he picked up the aliens after they were already in the United States; i.e., after they were brought to this country. See Ramirez-Martinez, 273 F.3d at 911-12 (a defendant cannot be convicted of aiding and abetting a completed offense).

Ramirez-Martinez drove from Fontana, California to El Centro, California, where he picked up a van from "some guy." See id. at 907. He then followed the "guy" from El Centro to Ocotillo, California. See id. at 907, 913. When the aliens arrived in Ocotillo, which is only five miles from the border, the defendant was already there, waiting for them. See id. at 907, 913.

Ramirez-Martinez set forth both parties' arguments prior to resolving the issue. It noted that Ramirez-Martinez argued that his "bring to" conviction "cannot stand because the evidence

adduced at trial showed that he did not encounter [the alien] until after [the alien] had crossed the border - until the 'bringing to' offense was complete." Id. at 921. The government argued that "a 'bringing to' offense, although complete once the alien crosses the border, continues until the alien reaches his 'immediate destination' inside the United States." See id. at 912. After setting forth the parties' arguments, the Ramirez-Martinez panel stated it view:

> Ramirez's argument is largely disposed of by our decision in Angwin. In that case, we embraced the concept that a person could be guilty of aiding and abetting the crime of bringing an alien to the United States. In illuminating this idea, we relied on the Second Circuit's opinion in United States v. Aslam, 936 F.2d 751, 755 (2nd Cir. 1991), which holds that the crime of bringing in aliens is *not complete until the alien reaches his immediate destination* in the United States.

Id. (citing United States v. Angwin, 263 F.3d 979 (9th Cir. 2001) ("Angwin I")) (emphasis added).[3]

---

[3] Ms. Lopez has argued that this discussion was dicta. See generally Barapind v. Enomoto, 400 F.3d 744, 750-51 (9th Cir. 2005) (per curiam) (en banc). First, it was not necessary to the decision: the panel went on to reject Ramirez-Martinez's arguments based on a more traditional analysis; it found that the evidence supported a finding that the defendant acted before the aliens entered the United States. See Ramirez-Martinez, 273 F.3d 912-13 ("if evidence adduced at trial demonstrates that a defendant acted before the 'bringing to' offense was completed, then the defendant may surely be properly convicted of aiding and abetting.") Ramirez-Martinez held that the evidence demonstrated "concerted action," see id. at 912-13, and that the defendant's "important role helped lure the aliens to the United States." Id. One cannot "lure" someone "to the United States" who has already been brought here.

Second, some technically unnecessary statements of law contained in a three judge panel opinion may nonetheless be binding *unless* "the statement is made casually and without analysis, where

Ramirez-Martinez rejected the arguments of both parties. It rejected Ramirez-Martinez's argument by rejecting its premise: the offense was not "complete," so the rule precluding aiding and abetting of a completed offense was inapplicable. See id.

It similarly rejected the government's position that the offense was *complete upon entry*, and *continued* until the alien reached "his 'immediate destination' inside the United States." See id. The government's argument, which enjoys no support in section 1324 - nothing in that statute, or that statutory scheme, suggests that the "brings to" offense is a continuing one -- stands in stark contrast to the Ramirez-Martinez panel's view that the offense "is not complete until the alien reaches his immediate destination in the United States." Id. (citing Angwin I, 263 F.3d 979, and Aslam, 936 F.2d at 755).

The distinction is significant: under the government's view, the substantive offense is actually committed quite early in the game - upon entry - and continues. Under Ramirez-Martinez's view, the substantive offense is not complete, and therefore has not been committed, until the "immediate destination" is reached. Until

---

the statement is uttered in passing without due consideration of alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention." See United States v. Johnson, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (opinion of Kozinski, J.). Accord Miranda B. v. Kitzhaber, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam). See also Barapind, 400 F.3d at 751 (citing Judge Kozinksi's Johnson opinion with favor). As will be demonstrated below, the "immediate destination" discussion was undertaken "without due consideration of alternatives." See id.

that point, only attempt liability could attach. See, e.g., Johnson, 376 F.3d at 694 (in a case where "it was factually impossible for Johnson to complete the offense, he can only be subject to prosecution for an attempt").[4]

Ramirez-Martinez's "immediate destination" discussion is deeply flawed. First, the language of section 1324(a)(2) does not contain, or even hint at, an "immediate destination" requirement. When construing the meaning of a statute, the plain language generally controls. See United States v. Turkette, 452 U.S. 576, 580 (1981). The plain language of section 1324(a)(2) is clear in one respect: it punishes a person who "brings to or attempts to bring to the United States" an alien who does not have permission to enter. The primary definition of "to" in the Shorter Oxford English Dictionary is "the place approached and reached." Shorter Oxford English Dictionary 3323 (4th ed. 1993). Thus, once an undocumented alien "reaches" the United States, the section 1324(a)(2) offense is complete. See Gonzalez-Torres, 309 F.3d at 599 (defendant was liable for bringing aliens to the United States even though they did not effect an "entry" for the purposes of immigration law).

---

[4] Ramirez-Martinez's rejection of the government's continuing offense theory was likely due to the fact that such a finding would have to meet the rigorous standards established in Toussie. See 397 U.S. at 115 (An offense "should not be [construed to be a continuing offense] unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."). See infra Part IV.B.

Second, the "immediate destination" discussion is the product of an oversight by the Ramirez-Martinez panel: Angwin I was amended two weeks before Ramirez-Martinez was decided. See Ramirez-Martinez, 273 F.3d 903 (issued December 5, 2001); Angwin II, 271 F.3d 786 (amending Angwin I on November 21, 2001). The discussion contained in Angwin I and cited by Ramirez-Martinez did not make the cut in Angwin II. See Angwin II, 271 F.3d at 804-05. Ramirez-Martinez relied on non-existent authority.[5]

---

[5] Nor does Angwin I merit resurrection. First, it misunderstood the defendant's argument. He argued that he did not aid and abet because the offense was complete before he acted. See 263 F.3d at 997-98. Angwin I claimed that "[u]nder [Angwin's] interpretation, only a person who physically accompanied aliens across the border could be guilty of bringing in aliens." Id. at 998. While Mr. Angwin did argue that aiding and abetting was not an available theory under section 1324, see id. at 993-97, his sufficiency argument obviously assumed that such liability was theoretically possible; otherwise he would have no reason to "assert[] that a person cannot aid and abet a completed crime." Id. at 997. Nor does the completed offense argument require, in every case, presence at the border crossing. As Ramirez-Martinez recognized, liability could be predicated on pre-crossing activities that "lure" the aliens into the United States. See Ramirez-Martinez, 273 F.3d at 913.

Second, Angwin I criticized the defense for "cit[ing] no authority for the proposition that the crime of smuggling is complete the moment the alien enters the United States." 263 F.3d at 998. That is an odd complaint: the government agreed that the "offense is complete once the alien crosses the border," see Ramirez-Martinez, 273 F.3d at 913, and this Court's cases have reached the same conclusion. See, e.g., United States v. Munoz, 412 F.3d 1043, 1048 (9th Cir. 2005) (this Court's cases interpret section 1324(a)(2) not to require an "entry" as defined in immigration law).

Third, to the extent that the Angwin I panel sought (*sub silentio*) to invoke the continuing offense doctrine -- i.e., the offense is complete upon entry but continues until the "immediate destination" is reached -- it neither grounded its creation of an "immediate destination" requirement in the words of the statute, nor did it acknowledge or apply Toussie's rigorous standards of

Third, the out-of-Circuit authority cited in Ramirez-Martinez, see Aslam, 936 F.2d 751, is itself fatally flawed; Aslam is infected with the same error that this Court identified in Gonzalez-Torres: it failed to apprehend the amendments to section 1324(a)(2). In Gonzalez-Torres, this Court recognized that Congress undertook significant changes when it modified section 1324(a)(2) from "brings into" to "brings to"; it deleted the "entry" requirement. See 309 F.2d at 599. Aslam, however, "agree[d] with the Government that section 1324(a)(2) punishes those who participate in the process of bringing illegal aliens *into* the United States, and that the offense does not end at the instant the alien sets foot across the border." 936 F.2d at 755 (emphasis added). In fact, Aslam repeatedly refers to the offense as bringing in or into, as opposed to bringing to. See id. (passage quoted in the preceding sentence); id. ("we think Aslam's conduct violated the 'bringing in' misdemeanor"); id. ("The District Judge appears to have ruled out the possibility that the 'bringing in' misdemeanor and the transporting felony might overlap to some extent."); id. ("every act violating the 'transporting' felony might not violate the 'bringing in' misdemeanor"). Thus, Aslam missed Gonzalez-Torres's insight into the effect of the amendments to section 1324(a)(2).

---

statutory construction. See Toussie, 397 U.S. at 115. In light of the gaping holes in Angwin I's analysis, Angwin II rightly buried it. It should not have been disinterred in Ramirez-Martinez.

In addition to its repeated Gonzalez-Torres errors, Aslam also relies upon a Fifth Circuit case that simply does not address the issues presented here. See id. (citing United States v. Merkt, 794 F.2d 950, 953 (5th Cir. 1986)). Merkt is doubly irrelevant: it does not address the issues presented here, and it was decided under the previous version of section 1324,[6] not the version applied here and interpreted in Gonzalez-Torres. Aslam has no persuasive value.[7]

IV.

GONZALEZ-TORRES AND *RAMIREZ-MARTINEZ* CANNOT BE HARMONIZED.

A. *Ramirez-Martinez* Correctly Rejected the Continuing Offense Theory.

At oral argument, the government, for the first time, suggested that the "brings to" offense might be a continuing offense. As a threshold matter, that theory cannot avoid en banc review; Ramirez-Martinez rejected it when it found that the offense was not complete until the "immediate destination" was reached. See 273 F.3d at 912. A continuing offense, in contrast, is one

---

[6] Smith v. United States, 24 F.2d 907 (5th Cir. 1928), also predates the crucial amendments and, at any rate, involves conduct that "encouraged the [smuggler] to bring the aliens into ... the United States." Id. Conduct that "encouraged" the smuggler would necessarily have to precede the "bringing." Thus, Smith does not support the imposition of liability for conduct occurring wholly after the aliens are brought to this country.

[7] Ramirez-Martinez's reliance on withdrawn and inapposite authority suggests that its "immediate destination" discussion was undertaken without "due consideration of alternatives." See Johnson, 256 F.3d at 915 (opinion of Kozinski, J.).

that is complete, but nonetheless "perdures after the initial illegal act." United States v. W. R. Grace, 429 F. Supp.2d 1207, 1240 n.32 (D. Mt. 2006) (collecting cases). Thus, adoption of a "continuing offense" theory would require that an en banc panel overrule Ramirez-Martinez.

More importantly, the "brings to" offense simply is not a continuing one. An offense "should not be [construed to be a continuing offense] unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Toussie, 397 U.S. at 115. Certainly, no one could claim that "the explicit" language of section 1324(a)(2) "compels such a conclusion."

In fact, the Supreme Court has recognized that crimes involving unlawful "entry" are not continuing offenses, "as 'entry' is limited to a particular locality and hardly suggests continuity." United States v. Cores, 356 U.S. 405, 408 n.6 (1958). Accord United States v. Rodriguez-Rodriguez, __ F.3d __, 2006 WL 1841393, *2 (7th Cir. July 6, 2006) (following Cores); United States v. Rincon-Jimenez, 595 F.2d 1192, 1194 (9th Cir. 1979). The "brings to" offense, which is complete even prior to "entry," see Gonzalez-Torres, 309 F.3d at 598-99, is similarly limited. Indeed, because no "entry" is required -- "brings into" was changed to "brings to", see id. -- the "brings to" offense is not one "involving ... the importation of ... a person *into* the United

States." 18 U.S.C. § 3237(a) (emphasis added). Thus, there is no statutory basis for a finding that the "bring to" offense is a continuing one.

Nor does the "nature of crime involved" provide any assurance that Congress intended a continuing offense. As this Court has made clear, "the analysis turns on the nature of the substantive offense, not on the specific characteristics of the conduct in the case at issue." United States v. Niven, 952 F.2d 289, 293 (9th Cir. 1991), overruled on other grounds, United States v. Scarano, 76 F.3d 1471, 1477 (9th Cir. 1996).[8] There is nothing about the act of "bringing" an alien "to" the United States that "clearly contemplates a prolonged course of conduct." See Toussie, 397 U.S. at 120.[9] In other words, once an alien is here, she needs no more "bringing."

The statutory scheme itself suggests that the "brings to" offense is not a continuing one. A plain language construction -- one that follows Gonzalez-Torres and that finds that the offense is

---

[8] There is some tension between Niven and United States v. Morales, 11 F.3d 915 (9th Cir. 1993). Morales stated that the continuing offense doctrine "has no applicability to a situation like this where the charged criminal conduct itself extends over a period of time." See 11 F.3d at 918. But see Yashar, 166 F.3d at 877 (noting that Toussie's "focus is on the statutory language" and rejecting Morales); W. R. Grace, 429 F. Supp.2d at 1242-43 (following Yashar and Niven). But see also Morales, 11 F.3d at 918-22 (O'Scannlain, J., dissenting). Because the indictment here does not charge conduct over an extended period of time, Morales is inapposite.

[9] The legislative history provides no support to a continuing offense theory. See supra footnote 1.

complete no later than when the alien crosses the border -- would not create any gaps in liability: both transportation, see 8 U.S.C. § 1324(a)(1)(A)(ii), and harboring, see id., § 1324(a)(1)(A)(iii), offenses are available. See United States v. Vowiell, 869 F.2d 1264, 1269 (9th Cir. 1989) (construing the offense of assisting an escape not to be continuing because harboring an escapee is a separate offense).

Even if section 1324(a)(2) were ambiguous as to whether it contemplates a continuing offense, ambiguity is not enough to justify the significant expansion of liability -- in the form of minimum mandatory sentences -- that would be the result from the adoption of a continuing offense interpretation. As Toussie cautioned,

> "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

397 U.S. at 122 (quoting United States v. C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952)). See generally Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (Rule of Lenity). Congress has not "spoken in language clear and definite;" the "brings to" offense is not a continuing one.

B. The Substantive Elements Cannot Differ Based On Whether the Conviction Is Entered Under an Aiding and Abetting Theory.

At oral argument, the government suggested that the conflict between Ramirez-Martinez and Gonzalez-Torres could be resolved by

holding that the "immediate destination" is an element only for offenses prosecuted under an aiding and abetting theory. The government has cited no authority for the proposition that the substantive elements of an offense may differ depending upon whether an aiding and abetting theory is employed. It cannot: "aiding and abetting is a different means of committing a single crime, not a separate offense itself, for otherwise it could not be implicit in a substantive charge." United States v. Garcia, 400 F.3d 816, 820 (9th Cir. 2005). The alien's "immediate destination" is either an element in every case, or no cases at all. Ramirez-Martinez and Gonzalez-Torres therefore cannot be harmonized on this basis.

V.

CONCLUSION

Unless the immediate destination discussion in Ramirez-Martinez is dicta, an en banc panel of this Court must resolve the conflict between it and Gonzalez-Torres.

Respectfully submitted,

Dated: July 18, 2006

STEVEN F. HUBACHEK
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5008
Telephone: (619) 234-8467
Attorneys for Defendant-Appellant

CERTIFICATE OF COMPLIANCE

___ Defense counsel is in compliance with this Court's order dated June 27, 2006, filing the within brief in compliance with Circuit Rule 35-4 or 40-1(a) is Monospaced, has 10.5 fewer characters per inch and contains 4200 words.

7/18/06
Date

Signature of Attorney or
Unrepresented Litigant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) U.S.C.A. No. 05-50415
Plaintiff-Appellee,	) U.S.D.C. No. 04cr1648-BTM
v.	)
ANGELICA LOPEZ,	)
Defendant-Appellant.	)

I, the undersigned, say:

1. That I am over eighteen (18) years of age, a resident of the County of San Diego, State of California, not a party in the within action, and that my business address is 225 Broadway, Suite 900, San Diego, California, 92101-5008; and

2. That I mailed the within APPELLANT'S SUPPLEMENTAL BRIEF by U.S. mails, an original and fifteen (15) copies thereof to the United States Court of Appeals for the Ninth Circuit, 95 7th Street, San Francisco, CA 94103;

3. That I served the within Petition for Rehearing and Suggestion for Rehearing En Banc for Defendant-Appellant to counsel for Plaintiff-Appellee by mailing a copy to:

CAROL LAM, U.S. Attorney
Christopher Tenorio, Assistant United States Attorney
880 Front Street
San Diego, California 92101

4. That I mailed an additional copy to Defendant-Appellant, Angelica Lopez by U.S. mails, first class postage prepaid, at San Diego, California.

I certify that the foregoing is true and correct. Executed on July 18, 2006 at San Diego, California.

ANGELICA HERNANDEZ